Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

Robert Wagner and Margaret Wagner
Petitioners

v.

Patricia Devine, Kevin A. Jordain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of PoliceOfficers, and Local 388 of the International Brotherhood of Police Officers
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

October 1997

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QUESTION PRESENTED

Whether the exception to the First Amendment principles articulated by this Court in *Elrod v. Burns, Branti v. Finkel, and Rutan v. Republican Party of Illinois*, governing patronage practices by public employers, applies where members of a town council who politically oppose a new mayor and his administration conduct a campaign of retaliatory harassment against the mayor's appointed police chief, based solely upon the chief's political affiliation with and political support of the new mayor, preventing the chief's implementation new policies, preventing the performance of his duties as chief, and causing his constructive discharge?

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Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

The Petitioners Robert Wagner and Margaret Wagner respectfully pary that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion and Judgement of the Court of Appeals for the First Circuit are not yet reported, and are set forth in Appendix A. The Memorandum of Decision and Order of the District Court of Massachusetts, Western Division, are not reported and are set forth in Appendix B.

JURISDICTION

The judgement of the Court of Appeals for the First Circuit was entered on August 1, 1997. (App. A). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONSTITUTION, amendment I, provides in relevant part that "Congress shall make no law ... abridging the freedom of speech or of the press...."

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983, provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges , or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioners Robert and Margaret Wagner, brought this action pursuant to 42 USC §1983, for violation of plaintiff Robert Wagner's First Amendment rights to freedom of speech and of association. (App. A at 2). The plaintiffs' also asserted claims pursuant to state law for defamation, interference with business relations, and for Margaret Wagner's loss of consortium. *Id.* The defendants filed motions to dismiss prior to answering the complaint. (App. A at 2; App. B at 2).

Following argument on the motions on September 20, 1996, the district court ruled in favor of the defendants and dismissed the complaint in a decision dated November 6, 1996. (App. B). The court held that since Robert Wagner, appointed by the new mayor to be chief of police, was in a policymaking position, he had no First Amendment protection from retaliatory political harassment from members of the town council who were opponents of the new mayor's administration. (App. B at 6-7). The plaintiffs timely filed their notice of appeal to the Court of Appeals for the First Circuit. That court issued its decision affirming the district court on August 1, 1997. (App. A). The court of appeals held that a policymaker has no First Amendment protection from harassment by opponents of the administration which hired him. (App. B. at 10-11).

This case involves the interpretation of this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), concerning patronage employment practices, and whether the

principles articulated in those cases apply where politically motivated harassment is targeted at a policymaking officerholder by opponents of the mayor who appointed him. Both lower courts held that the above trilogy of patronage decisions stripped policymakers of First Amendment protections, and allowed campaigns of harassment designed to hinder and to prevent performance of the policymaker's duties, to be conducted against the policymaker solely on political grounds, without offending the Constitution.

The district court reasoned that since the policyholder was not protected from adverse job actions by the mayor who appointed him, he similarly had no protection from opponents of the mayor who harassed him for political reasons. (App. B at 6). The court of appeals held that the "... *Elrod-Branti* line of cases ... (excludes) policymaking public employees from constitutional protection." (App. A at 10). That court believed that the need to assure implementation of its electoral mandate by a new administration, which was one of the justifications for the excepting policymaking employees from First Amendment protection against politically based job action by their employer, is matched by the interest of political opponents to pursue objectives of their constituents. (App. A at 10).

Neither court distinguished between patronage based job actions involving politically sensitive appointees by the appointing authority, and campaigns of harassment directed toward high level appointees by opponents of their employer which interfered with and prevented such appointees' performance of their public duties. The courts rested their decisions solely on Petitioner Robert

Wagner's employment status as a policymaker.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS MISAPPLIED THE EXCEPTION FROM FIRST AMENDMENT PROTECTION CREATED FOR PATRONAGE SITUATIONS INVOLVING HIGH LEVEL PUBLIC EMPLOYEES, TO A CAMPAIGN OF HARASSMENT AGAINST A HIGH LEVEL PUBLIC OFFICIAL, BASED ON HIS POLITICAL AFFILIATION, BY OPPOSITION POLITICIANS

Through the issues presented in this petition, Petitioners seek to have this court define the parameters of First Amendment protections which high level public employees have in the performance of their duties with regard to adverse actions taken by political opponents of the administration for which the employee works, which actions are based solely on the political affiliation and beliefs of the employee. More specifically, can members of a town council who are political opponents a new mayor's administration, conduct a campaign of harassment against the mayor's appointed police chief (over whom the council has no authority to hire or fire) in retaliation for the new chief's political affiliation with and support of the mayor, and do so outside any First Amendment protections for the chief? The Petitioners contend that high level public employees retain First Amendment rights outside the patronage related employment situation involving policymakers excepted from constitutional protection by this court in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980).

In this case, Petitioner Robert Wagner was appointed chief of police of Holyoke, Massachusetts, by the new mayor William Hamilton. Only the mayor had the authority to hire or to fire the chief of police. Several members of the town council of Holyoke, including primarily those named as defendants herein, were political opponents of the mayor. Following the mayor's appointment of Petitioner Robert Wagner as police chief, the Defendant council members began a campaign of harassment against the new chief based solely on his affiliation with and support of the mayor. This harassment included but was not limited to attempts to eliminate the chief's salary; the reduction of his salary and benefits; constant, unfounded criticism and false accusations against him and the blocking of every program or project proposed by him; and interfering with his ability to do his job by among other things requiring him to attend council committee and subcommittee meetings without purpose except to increase the harassment of him. (App. A at 3). The harassment finally reached the point at which petitioner Wagner could not perform the duties of his office as police chief and serve the City of Holyoke, and he resigned.

The court of appeals' and the district court's opinions mis-apply the principles articulated by this Court in *ELrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980); and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In those cases, this Court defined the parameters of First Amendment protection for public employees in cases of politically motivated employment actions. This Court recognized First Amendment protections for public employees whose

positions were not politically sensitive, *i.e.*, those for which party affiliation was not an "... appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, *supra* at 518. Those officials for whom political affiliation was an appropriate consideration for appointment to a position, were excepted from First Amendment protections from job actions by their employers, based on political considerations, where the official's "... private political beliefs would interfere with the discharge of his public duties...." *Id.* at 517. However, all of the above decisions were decided in and restricted to employment decisions by the employee's employer, and had as their goal the enhancement of the "...State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* None extended the exception to political opponents of the employer, and none envisioned the use of the exception to undermine governmental efficiency and to hinder or prevent the performance of the official's public duties; both of which are allowed by the lower courts' decisions in the present case.

The present case, and those which it represents, differ from the situations for which the exception to First Amendment protection was created. Here, the actions directed against the Petitioner, while politically motivated, were not patronage actions by the Petitioner's employer. The Defendants did not have the authority to hire or to fire the police chief. The chief was appointed solely by the mayor, and accountable to him for his policy positions. The appointment by the mayor was patronage; the harassment by the defendant political opponents of the mayor in the city council were not. Thus, the present case is not analyzable in terms of

political patronage employment actions as were *Elrod v. Burns, supra*; *Branti v. Finkel, supra*; and *Rutan v. Republican Party of Illinois, supra*.. The better analysis is in terms of harassment in retaliation for one's political affiliation and beliefs.

The court in *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989), made the distinction between job action by an employer against a high level policymaking employee in order to further the goals of the administration for which he worked, and harassment of a high level policymaker by political opponents in order to interfere with the goals of the administration by which he was appointed. The use of political criteria by a public employer is permissible in cases of certain employees in decisions to retain the person, transfer or promote him. *Id.* at 1333. Such a "... use of politics is ... treated differently from harassment targeted on particular employees... Acts of retaliation must be distinguished from favored treatment of political supporters... It is one thing to be a target of a campaign of retaliation, another to be incidentally disfavored as an inevitable ... consequence of favoritism for other employees." *Id.* The court held that "(h)arassment of a public employee for his political beliefs violates the First Amendment...." *Id.*

This distinction was applied to an official who held a policymaking position by the same court in *Wallace v. Benware,* 67 F.3d 655 (7th Cir. 1995). There the court refused to apply the same presumptions which underlie political dismissals of policymakers to campaigns of retaliatory harassment. *Id.* at 662. The former set of presumptions is that such dismissals serve the public interest in efficient and effective government. The court

reasoned that "... it would be illogical to apply the same presumption to harassment designed specifically to hinder or to disrupt a ... (policymaking employee) in the performance of his duties." *Id.* The court then held that harassment of a public employee occupying a policymaking position violates the First Amendment where outright dismissal of that same employee for political reasons would not, even if the harassment has an ultimate goal of forcing the employee's resignation. *Id. at 663.*

While both W*allace v. Benware* and *Pieczynski v. Duffy*, involved harassment by the employer of an employee, *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988) presented a factual setting closer to the instant case. There, members of a town board, all Democrats, conducted a campaign of harassment against the town supervisor's confidential assistant after she ran for public office as a Republican. *Id.* at 397. The town supervisor had authority to appoint the assistant who "... served at his pleasure at a salary fixed by the town board. *Id.* The court, ruling prior to *Rutan v. Republican Party of Illinois*, *supra*, held that the *Elrod v. Burns* principles applied to job actions which stopped short of discharge. The court did not discuss the case in terms of the employment status of the plaintiff, a confidential employee and thus subject to the exception stated in *Elrod v. Burns* and *Branti v. Finkel*, but stated that, "(w)henever under color of state law unfavorable action is taken against a person on account of that person's political activities or affiliation, it raises First Amendment concerns." 857 F.2d at 900.

Factually, then, *Lieberman v. Reisman*, *supra*, is

similar to the instant case. In both cases, a local legislative body conducted a campaign of harassment against an employee of the local executive. In neither case did the legislative body have the authority to hire or fire the employee, but in both cases it had the authority to fix the employee's salary. Finally, in both cases the employee was in a position for which party affiliation was an appropriate criterion. The difference in the cases is that while the town board and the town supervisor were of the same political party in *Lieberman*, the defendant members of the town council in the instant case were political opponents of the mayor for whom the petitioner worked. In *Lieberman* the Court of Appeals for the Second Circuit reversed a district court's granting of a motion to dismiss the civil rights claim, while in the present case, the First Circuit upheld dismissal. There may have been a patronage-type issue in *Lieberman*, since one count in the complaint accused the town supervisor of politically based harassment, and he may have been supportive of the town board's actions, though that latter fact is not stated in the opinion. However, no such issue is present in the petitioner's case, since the mayor who appointed him to the position of police chief, continued to support him. However, *Lieberman* is important in that the court upheld a cause of action for harassment of a confidential assistant to a public official on First Amendment grounds.

Patronage is not coterminous with political action; it is one kind of political action, *i.e.* the right to appoint to government jobs, or the control of political appointments. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, vol. II at 1656 (1966). Thus, when political officeholders harass a political appointee of an

opposition party which is in power, their actions are not patronage, and they should not protected by the principles articulated by this Court to govern patronage employment actions involving officials in positions for which political affiliation is an appropriate criterion. *Cf., Wallace v. Benware, supra; cf., Elrod v. Burns, supra; Branti v. Finkel, supra;* and *Rutan v. Republican Party of Illinois, supra.* Such actions should be evaluated in terms of the general First Amendment principles announced by this Court in *Perry v. Sindermann*, 408 U.S. 593 (1972), as interpreted and applied in *Elrod v. Burns, supra, Branti v. Finkel, supra,* and *Rutan v. Republican Party of Illinois, supra.. Cf., Wallace v. Benware, supra.; cf. Lieberman v. Reisman, supra.*

The court of appeals in its decision in this case, refused to acknowledge the distinction between harassment by political opponents, and appropriate patronage employment decisions protected by the exception crafted in the *Elrod-Branti* decisions. In this case, the lower courts applied that exception to situations which are antithetical to the purpose for which it was created, and which defeat that purpose, which was: "... to promote the public interest by enhancing the effectiveness and efficiency of a unit of local government....," *Wallace v. Benware, supra* at 663. To allow the lower courts' decisions to stand would undermine the constitutional principles announced by this Court, and grant approval to decisions which improperly apply and extend those principles. Further, to allow the lower court's decisions to remain law, would subject high level municipal officials to campaigns of harassment by political opponents who, while they cannot fire the officials, can prevent or hinder

performance of their public duties and thereby harm the public interest which such public officials seek to serve.

This is not simply a case of "... stinging partisan attacks against ... (Petitioner's) efforts..." as the court of appeals stated. (App. A at 10). Legitimate partisan attacks by legislative opponents of the mayor would be protected by absolute immunity. *Cf.*, *Forrester v. White*, 484 U.S. 219 (1988); *see, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), (extending legislative immunity to the state and regional level), and *Acevedo Cordero v. Cordero-Santiago*, 958 F.2d 20 (1st Cir. 1992) (extending legislative immunity to the local level). However, actions by local legislators which single out a specific individual and treat him differently from others is not legislative but administrative and is not protected by absolute immunity. *Forrester v. White, supra*, at 229; *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994) (termination of a public works superintendent allegedly for his political affiliation by a county board, was administrative and not entitled to absolute immunity). It follows then, that a politically motivated campaign of harassment carried out by opposition members of a city council against a police chief appointed by the mayor , would not be protected by legislative immunity, and would violate the chief's First Amendment rights. *Id.*, and *Wallace v. Benware, supra; see, Lieberman v. Reisman, supra*..

The jurisprudential demarcation this Court established in *Forrester v. White, supra*, between legislative actions accorded immunity and administrative actions of legislators not accorded immunity, protects

against improper judicial intrusion into legislative actions and provides guidance for the lower courts in evaluating cases such as the present case. Petitioner submits that the lower courts in this case should have analyzed the case in terms of harassment rather than patronage, and applied *Forrester v. White* to protect legitimate "partisan attacks," if any, by opposition councilors seeking to represent their constituents and to gain political power. It is the non-legislative actions by the defendants about which the Petitioners complain. It is those actions which violated Petitioner Robert Wagner's First Amendment rights and it is those actions which are not accorded immunity.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND POSSIBLY THOSE OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The actions of the Defendants consisted of a campaign of harassment designed to undermine and to prevent the performance by the Petitioner of his public duties, rather than being designed to promote and to maintain "... governmental effectiveness and efficiency." *Cf., Branti v. Finkel. supra*. The decision below permits such actions by removing First Amendment protections from Petitioner as a policymaking public employee, while the decisions of the Seventh Circuit hold that the First Amendment prohibits such actions and maintains First Amendment protections for policymaking

employees who are the targets of such harassment. *Wallace v. Benware, supra.*

This case will allow this Court to resolve the conflict in the circuits which has arisen due to the lower courts' decisions in this case. The lower courts in the present case, as noted in Part I, *supra*, held that since the Petitioner Robert Wagner was a policymaker, he had no constitutional protection pursuant to *Elrod v. Burns, supra; Branti v. Finkel, supra*; and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), from political opponents who conducted a campaign of harassment against him which interfered with and prevented his performance of his duties as chief of police. (App. A at 3 and 10). Directly contrary to those holdings is the opinion of the Court of Appeals for the Seventh Circuit in *Wallace v. Benware, supra*. That court, as discussed in Part I, *supra*, held that a campaign of harassment directed against a policymaker and which was "... designed specifically to hinder or to disrupt ... (him) in the performance of his duties," violated the First Amendment and did not come within the policymaker exception from First Amendment protection recognized by this Court in *Elrod v. Burns* and *Branti v. Finkel.*

In, *Wallace v. Benware*, *supra*, the harassment was conducted by the policymaker's superior who had the power to hire and fire. However, the Court of Appeals for the Seventh Circuit refused to apply the *Elrod-Finkel* exception for policymakers to that situation. The court reasoned that the purpose of the exception, to "... promote the public interest by enhancing the effectiveness and efficiency of a unit of local government....," was confounded by a campaign of

harassment which hinders or prevents the official from performing his public duties. 67 F.3d at 663. This was so even if the harassment was designed to bring about the official's resignation. *Id.* The court stated that

> ... our approval of retaliatory dismissals that advance the public interest does not confer upon the sheriff a right to achieve that dismissal by means that have the effect of harming the public's interest in effective government.

Thus, *Wallace v. Benware*, holds that policymakers still retain First Amendment protections, albeit limited by the *Elrod-Branti* exception for patronage employment actions which promote the employer's and the public's interests; while the lower courts in the instant case held that a policymaker loses all First Amendment protections by virtue of that status. The Petitioners assert that the decision in *Wallace v. Benware*, correctly construes and applies this Court's controlling precedents and maintains First Amendment protections for public employees in policymaking positions where the purposes of the exception from First Amendment protections does not apply. This understanding of *Elrod-Branti* would protect all employees from campaigns of harassment directed against them based on their political affiliation or belief. Harassment which interferes with the official's ability to perform the duties of his office directly contradicts the reasons for which the exception was created, and is antithetical to the public's interests. Efficiency is not promoted by such actions, and the policies approved by the electorate are not advanced. *Cf., Elrod v. Burns, supra;* and *Branti v. Finkel, supra.*

The Court of Appeals for the Second Circuit in *Lieberman v. Reisman, supra*, also appears to have removed harassment from the kinds of actions included within the protection of the exception for patronage employment actions against officials in politically sensitive positions. That court held that a claim of harassment against a confidential employee based on political affiliation and beliefs, stated a cause of action for violation of First Amendment rights. That court, however, did not discuss the exception although the employee was the confidential assistant of a Town Supervisor. Confidential employees were identified by this Court as coming within the exception to otherwise unconstitutional patronage employment actions. *Elrod v. Burns, supra; Branti v. Finkel, supra.* Assuming that the court intended to treat claims of harassment of such employees as not covered by the exception, then its decision would be in conflict with the decisions of the lower courts in Petitioner's case, and the division in the circuits would widen.

III. THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE

The question presented has direct and significant effect and importance for high level municipal as well as state employees throughout the nation. These employees are vital to the functioning of government and they must be provided legal protection against non-legislative actions by opposition political party members which harass and prevent or hinder the effective and efficient performance of the public duties these employees were appointed to perform. The federal and

all the state constitutions establish appropriate checks and balances between the branches of government. This Court has recognized those political structures and has articulated a jurisprudential body of principles to guide the lower courts in evaluating disputes which involve potential separation of powers issues.

The patronage trilogy, *Elrod, Branti and Rutan*, address one aspect of that issue, while *Forrester v. White* addresses another. The former decisions mark out the contours of First Amendment protections for public employees while allowing political decisions to prevail in appropriate, politically sensitive positions. The latter decision, demarcates the boundary between legislative actions not subject to judicial intervention, and administrative actions of legislators which if harmful are subject to judicial review. These boundary lines must be maintained and must be maintained as clearly as possible in order to promote a vigorous political system and at the same time maintain a rule of law which can identify clearly which actions by political officials breach the barrier insulating legislative actions from judicially reviewable administrative actions which impose harm on individuals which is not countenanced by a democratic system of government.

The question presented in this case will allow the Court to clarify that rule of law, and will allow the articulation of principles protective of individuals who choose to serve the public, while allowing full and unfettered political debate. Unless protections are provided for high level public employees from malicious, unfounded and purely politically motivated campaigns of harassment, fewer and fewer citizens of merit and

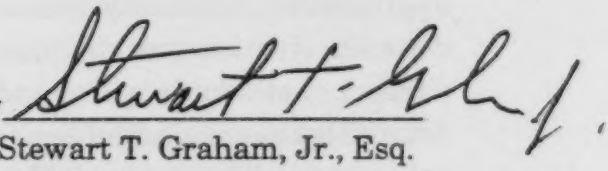
quality will choose to serve the public. Such a result will ultimately produce a system of government marked by mediocrity and mendaciousness, and the laws which were intended to protect a vigorous and effective government will instead doom it.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted
THE PETITIONERS

Date: 10/29/97

By 

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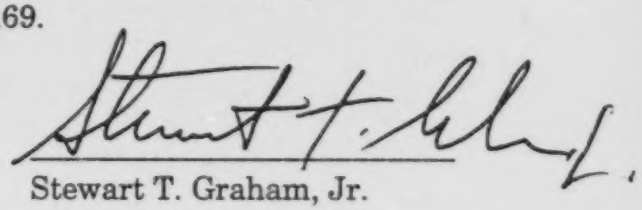
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all parties, or their attorneys of record, if represented, by mailing same, postage prepaid, first class mail to John H. Fitz-Gibbon, Esq. and Harry Miles, Esq., 77 Pleasant Street, P.O. Box 210, Northampton, MA 01061; and to Lawrence Humphrey, Esq. International Brotherhood of Police Officers, 159 Burgin Parkway, Quincy, MA 02169.

Date: 10/29/97



Stewart T. Graham, Jr.

Appendix A

United States Court of Appeals
For the First Circuit

No. 96-2315

Robert Wagner and Margaret Wagner
Plaintiffs, Appellants,
v.
Patricia Devine, Kevin A. Jourdain, Charles E. Moran, III, Arthur Therrien, John E. Whelihan, the City of Holyoke, Massachusetts, the International Brotherhood of Police Officers, Local 388, and the International Brotherhood of Police Officers,
Defendants, Appellees.

Appeal from the United States District Court
For the District of Massachusetts
[Hon. Frank H. Freedman, Senior U.S. District Judge]

Before
Selya, Circuit Judge,
Coffin and Cyr, Senior Circuit Judges.

Stewart T. Graham, Jr., for appellants.

John H. Fitz-Gibbon with whom Harry L. Miles was on brief of appellees Devine, Jourdain, Moran, Whelihan and the City of Holyoke, Massachusetts.

Lawrence D. Humphrey for appellees Therrien, International Brotherhood of Police Officers, Local 388, and the International Brotherhood of Police Officers.

August 1, 1997

COFFIN, Senior Circuit Judge. Appellant Robert Wagner, former chief of police in Holyoke, Massachusetts, claims that his First Amendment freedom of political association was violated when members of the city council and others subjected him to severe harassment, ultimately forcing him to resign, because of his political support for the city's mayor. He filed this lawsuit alleging federal constitutional and state law claims.[1] The district court dismissed the First Amendment counts for failure to state a claim, and declined supplemental jurisdiction over the state law counts. Because the First Amendment does not protect a policymaking official such as appellant from criticism and harassment, we affirm.

I. Factual Background [2]

Appellant Wagner was appointed Holyoke's chief of police in July 1991 by then newly elected Mayor

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[1] The complaint included a count for loss of consortium on behalf of Wagner's wife, Margaret Wagner. Because this claim survives or fails with Robert Wagner's state claims, we do not address it separately.

[2] We note that the facts alleged in Wagner's complaint provide a much sketchier picture of the defendants' alleged conduct than the facts described by counsel at the hearing on defendants' motion to dismiss. In reviewing a Rule 12(b)(6) dismissal, we typically consider the "well pleaded facts as they appear in the complaint," *see Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 51 (1st Cir. 1990) (emphasis added). Because we ultimately uphold the dismissal, and the additional facts are helpful in understanding the case we draw the facts in this section from both the complaint and the hearing. For purposes of the motion to dismiss, we take the allegations as true and grant all reasonable interferences in Wagner's favor. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)

Hamilton. Wagner asserts that four members of the City Council who were Hamilton's political opponents engaged in a campaign of harassment against him for the purpose of embarrassing the mayor and forcing appellant to resign. He contends that their criticisms of his job performance were unfair and inaccurate, and that their actions were motivated solely by their opposition to his political beliefs and his political support of the mayor.[3] He further asserts that the president of the police union, and through him the local and international unions, conspired with the council members to effectuate the plan to oust him.

The complaint accuses the council members of harassing him by means of unspecified "actions," and numerous false and defamatory statements. At the hearing on the motion to dismiss, appellant's counsel identified the challenged actions as follows:

> They were constantly criticizing him. They had subcommittees that they were chairing and they had him up to see the council constantly, criticizing him in everything he did....They tried to eliminate his salary. They reduced his salary. They reduced his benefits. They refused to fund programs that he was pushing.

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[3] In his appellate briefs, Wagner makes several passing references to a First Amendment violation based on his political speech, as well as on political affiliation, and he cites several speech cases in support of his arguments. The complaint, the hearing on the motion to dismiss, and the district court's opinion all reveal that this case has been litigated solely on the theory that defendants harassed and constructively discharged him based on his political beliefs and affiliation. Our analysis is therefore confined to that context.

Although the mayor has sole authority under the city charter to hire or fire the police chief, the council has power to set the salary and benefits for the position. According to Wagner, the four defendant council members, a minority of the governing body, "led the charge" against him and secured the complicity of enough other councilors to accomplish their unlawful objectives.

Wagner resigned in September 1994. He asserts that he was forced to do so because the defendants' actions and statements hindered, undermined, and interfered with the performance of his duties, and thus constituted a constructive discharge.[4]

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[4] Defendants contend that they cannot be found liable for a constructive discharge because only the mayor had the authority to fire Wagner. Their argument cuts too narrowly. Although the city council may not have had explicit authority to terminate the police chief, its authority to set salary, benefits and working conditions gave it the power to accomplish a constructive discharge. *See, e.g. Vega v. Kodak Caribbean, Ltd.*, 3 F.3d 476, 480 (1st Cir. 1993) (constructive discharge occurs when "working conditions [are] so intolerable[] that a reasonable person would feel compelled to forsake his job rather than to submit to looming indignities"); *Aviles-Martinez v. Monroiq*, 963 F.2d 2, 6(1st Cir. 1992) (similar). Of course, a minority of the council does not have such power, and a finding of constructive discharge would require some showing that the challenged conduct actually was attributable to the alleged discrimination. *See generally Scott-Harris v. City of Fall River*, Nos. 95-1950-1952, 95-2100, 1997 WL 9102, at *9-10 (1st Cir. Jan. 15, 1997), *cert. granted sub nom Bogan v. Scott-Harris*, 65 U.S.L.W. 3809 (U.S. June 10, 1997) (No. 96-1569). In any event, as we conclude *infra*, such a discharge would not be actionable if, as here, the affected employee was a policymaker.

This lawsuit followed. In addition to federal civil rights claims under 42 U.S.C § 1983, which assert violation of his First Amendment right to political association, Wagner alleged a state civil rights violation, and state law claims of defamation, tortious interference with contractual relations, and, in his wife's name, loss of consortium. In response to the defendants' motion to dismiss under FED. R. CIV. P. 12 (b) (6), the district court substantively addressed only the section 1983 count. It ruled that "the alleged harassment which Wagner sustained at the hands of a minority of the city councilors and a subordinate police officer was not of sufficient degree to constitute ' a constitutionally significant burden on [Wagner's] political association right.'" Memorandum and Order at 5 (quoting *Agosto-de-Feliciano v. Aponte-Rogue* 899 F.2d 1209, 1216 (1st Cir. 1989) (*en banc*)).

The court also concluded that, even if the harassment had been sufficiently severe to implicate constitutional concerns, Wagner's First Amendment claim still would fail because the police chief's position was one for which political affiliation is an appropriate requirement. Public employees who hold such positions, the court ruled, are not protected by the First Amendment from partisan attacks on their job performance. Having dismissed the federal claims, the court declined to exercise supplemental jurisdiction over the remaining state law causes of action and dismissed them as well.

The Wagners then filed this appeal. Our review of the district court's Rule 12(b)(6) dismissal is *de novo*. *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 28 n.2 (1st Cir. 1996). We may affirm a dismissal for failure to state a claim only if it clearly appears that, on the facts alleged, the plaintiff cannot recover on any viable

theory. *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990). Because the district court's ruling that the First Amendment does not protect Wagner from politically motivated discrimination is both correct and dispositive, we turn to that issue first.[5]

II. Discussion

The Supreme Court more than twenty years ago established that the First Amendment provides protection for public employees from adverse job action based solely on partisan political affiliation. *See, Elrod v. Burns,* 427 U.S. 347 (1976) (plurality opinion); *Branti v. Finkel,* 445 U.S. 507 (1980); *Rutan v. Republican Party*, 497 U.S. 62 (1990).[6] The protection is not universal, however. In its precedent-setting case examining the constitutionality of the patronage system, the Court recognized the competing First Amendment interest of the in-power political party "to insure that policies which the electorate has sanctioned are effectively implemented," *Elrod*, 427 U.S. at 372. The Court therefore allowed patronage practices to continue for

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5 Wagner contends that the district court's other holding, that the harassment he suffered was not constitutionally significant, was based on a misreading of the complaint. We need not, and therefore do not, take up this issue.

6 The Supreme Court addressed politically motivated discharges in *Elrod* and *Branti*, extending its reasoning to other forms of employment discrimination in *Rutan*.

those employees who, *inter alia*, make policy or occupy positions of confidence. *Id.; Branti*, 445 U.S. at 517-18.[7]

Our circuit has since faced a long line of cases raising the issue of political discrimination in employment, most of which have focused on whether the particular position held by the plaintiff employee fell inside or outside the First Amendment-protected sphere. *See, e.g., Agosto-de-Feliciano*, 889 F.2d at 1212 & n.1, 1218 (noting "first wave" of cases involving outright dismissals, and adopting standard for evaluating "second wave" cases involving discriminatory conduct falling short of discharge). This case presents an interesting departure from the norm. Both parties accept that Wagner's job as police chief sufficiently elevated him in the Holyoke hierarchy that, under the principles we have just outlined, he could be fired based on political affiliation.

Wagner, however, contends that he was subjected to an impermissible constrictive discharge because only the mayor -- the official who hired him and for whom he served as a policymaker -- may fire him based on political affiliation without violating the First Amendment. This is so, he maintains, because the *Elrod-Branti* exception was designed to ensure that the policies of a new administration -- "policies presumably

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[7] At various points in this opinion, we use the term "policymaker" as a shorthand reference for the several categories of employees for whom partisan affiliation is an appropriate job criterion. Such employees are " 'involved in policymaking, the communication of political ideas, or sensitive tasks connected with the policymaking function,' *Vazquez Rios v. Hernadez Colon*, 819 F.2d 319, 322 (1st Cir. 1987), [] or 'occupy [] positions of . . . unusually intimate propinquity to government leaders,' *id.* at 324." *Correa-Martinez*, 903 F2d at 56 n.6.

sanctioned by the electorate," *Elrod*, 427 U.S. at 367 -- would not be undercut by the obstructive tactics of opposition incumbents.. This rationale provides no justification for *opponents* of a new administration -- such as the defendants here -- to harass the administration's supporters. Their conduct, Wagner argues, is therefore unconstitutional.

Wagner's analysis ignores the reality of precedent. Both Supreme Court and First Circuit caselaw have recognized the applicability of the *Elrod-Branti* dichotomy outside the context of a new administration's patronage practices. The conflict in *Rutan*, where the Supreme Court held that the first Amendment forbids government officials from basing less-than-discharge actions such as hiring, promotion and transfer on political affiliation and support, did not arise amidst the seating of new administration. At issue was the implementation of an executive order proclaiming a hiring freeze, with "exceptions" allegedly made based on political affiliation. In referring back to *Elrod* and *Branti* in the opinion's opening, paragraph, the majority broadly described those cases as protecting public employees from discharge "solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved," 497 U.S. at 64. That decision indicates that the First Amendment protection against patronage practices, as well as the exceptions for certain categories of highly placed employees, apply whenever public employees are at odds politically with their superiors and thus subject to politically discriminatory behaviors.

Our decision in *Romero-Barcelo*, 75 F.3d at 33-34, brings us even closer to the present context. In rejecting

a former Puerto Rico governor's allegations that he had suffered severe political discrimination during a murder investigation because of his association with the out-of-power New Progressive Party (NPP), we stated:

> The Supreme Court has held that the First Amendment "protects nonpolicymakers from being drummed out of public service on the basis of their political affiliation or advocacy of ideas." ... But Romero-Barcelo most assuredly qualified as an NPP policymaker... Thus, the district court correctly found no First Amendment protection for "a politician whose rights to freedom of speech, freedom os association, and freedom ' to disassociate [oneself] from unpopular views' have been injured by other politicians seeking to undermine his credibility within his own party and with the electorate."

75 F.3d at 34 (Citations omitted). *Cf. Larou v. Ridlon*, 98 F.3d 659, 661 (1st Cir. 1996) (noting as a general principle that "[t]he First Amendment protects nonpolicymaking public employees from discrimination based on their political belief or affiliation"); *Correa-Martinez*, 903 F.2d at 56-57 & n.6 (same).

Our conclusion in *Romero-Barcelo* stemmed from a recognition that an administration's need to assure that it can implement the people's will is matched by the equally legitimate right of political opponents to exert pressure on behalf of their veiwpoints and constituents. Indeed, like the mayor, the minority members of the Holyoke City Council represented a portion of the electorate, and they therefore share the rationale that they were pursuing objectives sanctioned by the voters

who supported them. The democratic process envisions a give-and-take in matters of policy, and the unfortunate fact that some individuals will be caught in the crossfire is "an all too real by-product of our long-standing organization of political life into two or more parties," *Agosto-de-Feliciano*, 889 F.2d at 1217.

The *Elrod-Branti* line of cases struck a balance between the competing First Amendment interests by excluding policymaking public employees from constitutional protection. *See, e.g., id.* at 1215 (quoting *Elrod* to the effect that "there are First Amendment interests on both sides"); *Pieczynski v. Duffy*, 875 F.2d 1331, 1334 (7th Cir. 1989) (noting "the balance"). Policymakers, as front-line representatives of the policies they were hired to implement, can be expected to face stinging partisan attacks against their efforts by outsiders seeking to persuade the electorate (and fellow legislators) to make them the insiders. Wagner was in a particularly vulnerable position because of the division of power over his job between the mayor and city council, both of whom possessed municipal authority -- albeit in different ways -- to terminate his employment. At least when the political pressure exerted by those in power is within their authority,[8] the First Amendment down not provide a shield for those whose positions are politically sensitive.

We add this comment about appellant's particular circumstances. Were appellant's argument to be

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8 There is no allegation, for example, that the city council lacked authority to reduce, or even eliminate, the police chief's salary, or that improper procedures were followed.

accepted --*i.e.*, that harassment and criticism by political opponents rising to the level of a constructive discharge constituted a First Amendment violation -- we quail at the prospect of judges and juries being inundated by claims of unhappy politicians that their opponents had transgressed the boundary between constitutional and unconstitutional fair play. Partisan politics does not, we fear, lend itself to the rulemaking authority of a Marquess of Queensberry.

We therefore conclude that, because there is no dispute that appellant Wagner's position as police chief was a policymaking one, the district court properly held that he had no First Amendment right to be free from discriminatory treatment based on his politics. This conclusion makes it unnecessary to consider the other issues surrounding his First Amendment claims, including the adequacy of his allegations, the scope of legislative immunity, and whether the allegedly improper motives of a four-member minority of a fifteen-member city council provide a basis for municipal liability. In these circumstances, dismissal of the state law claims also is appropriate. *See McIntosh v. Antonino*, 71 F.3d 29, 33 n.3 (1st Cir. 1995).

The judgment of the district court is affirmed.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Robert Wagner and	)	
Margaret Wagner	)	
Plaintiffs	)	
	)	
v.	)	**CIVIL ACTION**
	)	**No. 95-30257-FHF**
Patricia Devine, et al	)	
Defendants	)	

MEMORANDUM AND ORDER

November 8, 1996

FREEDMAN, S.J.

I. INTRODUCTION

Robert Wagner ("Wagner") complains that during his tenure as Chief of Police for the City of Holyoke, Massachusetts, political opponents of then-Mayor William Hamilton conspired to harass and publicly humiliate Wagner. Wagner asserts that the public criticism he sustained prevented him from effectively performing his job and forced him to resign as Chief of Police. Alleging federal and state civil rights violations, defamation, and tortious interference with contractual relations, Wagner has sued Holyoke, four Holyoke city councilors, the Holyoke police union and the president of the Holyoke police union, seeking compensatory damages, costs, and attorney's fees. Wagner's wife, Margaret Wagner, has sued for loss of consortium.

Holyoke and the Holyoke city councilors, as well as the police union and the union's president, have moved to dismiss the Wagners' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Wagners oppose the motions.

II. STANDARD OF REVIEW

A complaint serves the narrow purpose of providing a defendant with adequate notice of a plaintiff's claims and the grounds upon which they rest. *See Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 227 (1st Cir. 1990); *see also* FED.R. CIV. P. 8(a) (2). When assessing the legal sufficiency of a complaint, the issue before a court is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *V.S.H. Realty, Inc. v. Texaco Inc.*, 757 F.2d 411, 414 (1st Cir. 1985) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Therefore, in reviewing a Rule 12(b) (6) motion, a court must construe the plaintiff's complaint liberally, accepting the factual averments contained in the complaint as true, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with law, the court must deny a defendant's motion to dismiss. *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994); *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 17 (1st Cir. 1992); *Torres Ramirez*, 898 F.2d at 226.

III. FACTS

The Court will recite the facts in the light most favorable to the Wagners. *See Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). On July 8,

1991, Mayor Hamilton appointed Wagner as Holyoke's Chief of Police. At the time of Wagner's appointment, Patricia Devine, Kevin Jourdain, Charles Moran and John Whelihan were members of the Holyoke City Council; all were political opponents of Mayor Hamilton. The Holyoke City Council is powerless to appoint or discharge the Chief of Police.

During meetings of the City Council, Devine, Jourdain, Moran, and Whelihan made unspecified statements criticizing Wagner and Wagner's performance as Chief of Police. Arthur Therrien, a Holyoke police officer and President of the International Brotherhood of Police Officers, Local 388, supplied Devine, Jourdain, Moran, and Whelihan with unspecified information critical of Wagner. Wagner states that the criticism of him during City Council meetings as bogus and was motivated by Wagner's political affiliation with Mayor Hamilton. The statements undermined Wagner's ability to perform his duties, and were ultimately intended to force Wagner's resignation and to embarrass Mayor Hamilton.

In addition to their comments in City Council meetings, Whelihan and Jourdain also made statements regarding Wagner which were reported in newspapers throughout western Massachusetts. Whelihan stated that he did not feel comfortable at City Council meetings with Wagner sitting behind him armed with a gun. In another context, Whelihan was quoted as saying that "Wagner's elevator is stuck between two floors," and that Wagner "did not know what he was talking about." Also, at some point, Jourdain denied an assertion by Wagner that Jourdain had requested a gun permit for personal protection. According to Wagner, each of these

statements is defamatory.

On unspecified occasions, Therrien also commented to the press respecting Wagner's performance. Therrien accused Wagner of misappropriating police funds and abusing overtime pay. Therrien also complaint of mismanagement and an overall lack of direction within the police department. Therrien hypothesized that Wagner was forced to resign by Mayor Hamilton. Wagner claims that Therrien's statements were defamatory and made with the intent of forcing Wagner's resignation.

Eventually, Wagner resigned his position as Chief of Police in Holyoke. This lawsuit followed.

IV. DISCUSSION

Counts I and III of the Amended Complaint seek relief under 42 U.S.C. §1983, alleging that Wagner's forced resignation violated his First Amendment right to political association. Count II seeks recovery for the violation of Wagner's state civil rights. Counts IV, V, and VI sound in defamation. Count VII alleges tortious interference with contractual relations. In Count VIII, Mrs. Wagner seeks loss of consortium damages.

A. Section 1983 Claims

The success of Wagner's section 1983 action depends upon the viability of his First Amendment claim. Wagner's First Amendment claim is grounded on the public comments made by Devine, Jourdain, Moran, Whelihan, and Therrien respecting Wagner's performance as Chief of Police. Wagner argues that the politically-motivated harassment he sustained left him

with no choice other than to resign his position. As a consequence of his unlawful constructive discharge. Wagner contends that he was denied the right to associate with Mayor Hamilton and the right to hold his own political beliefs.

Under First Circuit precedent, a public employee states a claim for violation of his right to political association "when the government's actions are sufficiently severe to cause reasonable hardy individuals to compromise their political beliefs and associations in favor of the prevailing party." *Agosto-de-Feliciano v. Aponte-Rogue* 889 F.2d 1209, 1217 (1st Cir. 1989). In the Court's view the "slurs and gibes" Wagner outlines in his Amended Complaint merely comprise "an all too real by-product of our long-standing organization of political life into two or more parties." *See id.* By accepting the position as Holyoke's Chief of Police and joining Mayor Hamilton's administration, Wagner reasonable could be required "to develop a suitable thick skin to withstand the rigors of our societal, often highly politicized, life." *See id.* Overall, the Court concludes that the alleged harassment which Wagner sustained at the hands of a minority of city councilors and a subordinate police officer was not of sufficient degree to constitute "a constitutionally significant burden on [Wagner's] political association right." *See id* at 1216. As a result, Wagner's section 1983 action will prove unsuccessful, and Counts I and III of the Amended Complaint will be dismissed.

Even assuming, *arguendo*, that the public criticism of Wagner was so severe that a reasonable person in Wagner's position would have compromised his political beliefs and resigned in the face of such scrutiny,

Wagner's First Amendment claim would still fail. While it is true that a line of federal cases beginning with *Elrod v. Burns*, 427 U.S. 347 (1976), recognizes that the First Amendment protects a public employee from adverse government action based upon the employee's political beliefs, *see, e.g. Rutan v. Republican* Party, 497 U.S. 62 (1990); *Agosto-de-Feleciano v. Aponte-Rogue*, 889 F.2d 1209 (1st Cir. 1989); *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989), *Elrod* and its progeny do not extend First Amendment protection to a public employee who holds a position where "' party affiliation is an appropriate requirement'" for the job. *See Figueroa-Rodriguez v. Lopez-Rivera*, 878 F.2d 1478, 1480 (1st Cir. 1989) (quoting *Branti v. Finkel*, 445 U.S. 507 (1980)); *see also Benoit v. Weld*, 804 F. Supp. 393, 399 (D. Mass.), *aff'd*, 977 F.2d 566 (1st Cir. 1992).

In Holyoke, the Chief of Police is appointed by the Mayor. Thus, like-mindedness with the Mayor on matters of law enforcement policy is an obvious and appropriate requirement for the position. Under *Elrod* and its progeny, if a divergence of views ever arose between Mayor Hamilton and Wagner, then Mayor Hamilton could have discharged Wagner for political reasons with impunity. Given that the first Amendment allowed Wagner to be open to politically-based assaults from his own boss, the Court discerns no reason why Wagner was not also open to politically-based harassment and criticism from other government agents.[1] In the end, the Court finds that Wagner, not

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[1] Wagner's reliance on *Miller v. Hull*, 878 F.2d 523 (1st Cir. 1989), is misplaced.

ujnlike other high-ranking policymakers in Holyoke, was not protected by the First Amendment from partisan attacks on his job performance.

B. State Law Claims

Count II and Counts IV-VIII of the Amended Complaint are before the Court by virtue of supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). In the event, however, that a district court has dismissed all claims over which it possessed original jurisdiction, the district court may decline to exercise supplemental jurisdiction over the remaining claims. *See* 28 U.S.C. 1367(c) (3). Having dismissed the Wagners' federal law claims, the Court declines to retain jurisdiction over their remaining state law claims. Accordingly, Counts II and Counts IV-VIII are dismissed for lack of subject matter jurisdiction. *See Benoit,* 804 F.Supp. at 399; *see also Rodriquez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1175-76 (1st Cir. 1995) (explaining origin and parameters of supplemental jurisdiction).

V. CONCLUSION

For the above-stated reasons, defendants' motions to dismiss are GRANTED.

It is So Ordered.

Frank H. Freedman
Senior United States District Judge